

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
On-Brief April 2, 2007

**DONALD R. MCMAHAN v. TENNESSEE DEPARTMENT OF
CORRECTION**

**A Direct Appeal from the Chancery Court for Davidson County
No. 04-1146-IV The Honorable Richard Dinkins, Chancellor**

No. M2005-01625-COA-R3-CV - Filed on July 26, 2007

This is a declaratory judgment suit filed by an inmate in the Tennessee Department of Correction asserting that T. C. A. § 40-28-123 violates his constitutional rights of due process and constitutes double jeopardy. The trial court granted summary judgment to the department of correction, and the inmate appeals. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Donald R. McMahan, Pro Se

Paul G. Summers, Attorney General and Reporter; Arthur Crownover II, Senior Counsel, Civil Rights and Claims Division for Appellee, Tennessee Department of Correction

OPINION

I. Factual and Procedural History

Donald R. McMahan (“Petitioner,” “Appellant,” “Mr. McMahan”) is an inmate in the Tennessee Department of Correction (“Respondent,” “Appellee,” “TDOC”). Approximately March 29, 1989, Mr. McMahan was convicted of various drug-related offenses. He was sentenced to a 42 years of imprisonment with parole eligibility after serving 30% of that sentence. Mr. McMahan was assigned to the Carter County Work Camp, where he was assigned a position as “park worker” and was allowed to work in the community. In 1992, while imprisoned at the Carter County Work Camp, Mr. McMahan was convicted by the Carter County Criminal Court for possession of contraband, a felony. Based on this conviction and pursuant to T.C.A. § 40-28-123(b)(1), Mr. McMahan lost his parole eligibility date.

On February 23, 2004, Mr. McMahan petitioned the TDOC for a declaratory order stating that T.C.A. § 40-28-123 was unconstitutional as written and as applied. The TDOC denied Mr. McMahan's petition on March 29, 2004. Mr. McMahan then filed a petition in the Davidson County Chancery Court on April 19, 2004, seeking a declaratory judgment. In his petition, Mr. McMahan raised the following five issues:

1. Whether the Constitution of the State of Tennessee, Article 2, §§ 1 and 2 prohibits the Legislative Branch from enacting any statute that transfers the powers of the Judicial Branch to any agency of the Executive Branch?
2. Is T.C.A. § 40-28-123 in violation of the Constitution of the State of Tennessee, Article 2, §§ 1 and 2, in that it gives the Tennessee Department of Correction, an agency of the Executive Branch, the power and authority to usurp and ignore the judgments/orders of the Judicial Branch in matters of sentencing and service of sentence?
3. Whether the actions of the Tennessee Department of Correction in altering the judgments/orders of a sentencing court without notice or a hearing violates the Constitution of the State of Tennessee, Article 1, § 8 and the Constitution of the United States, Amendments 5 and 14 prohibitions against denying due process of law?
4. Whether the extension of his R.E.D. to 100% and a conviction for the same offense based on the same incident was double jeopardy and in violation of the Constitution of the State of Tennessee, Article 1, § 10 and the Constitution of the United States, Amendment 5?
5. Whether T.C.A. § 40-28-123 was mis-applied to the petitioner as he was not "assigned to any work release, educational release, restitution release or other program whereby he enjoyed the privilege of supervised release into the community."?

In response to Mr. McMahan's petition, the State of Tennessee filed a motion for summary judgment on May 19, 2004. On July 9, 2004, the trial court denied the state's motion because the Attorney General's office had filed its motion for summary judgment on behalf of the State of Tennessee, a non-party. The trial court also found that the motion was deficient for failure to comply with Tenn. R. Civ. P. 56.03.

On July 15, 2004, the TDOC filed a second motion for summary judgment, supported by a memorandum of law and an affidavit of Roberta Anderson, a sentence manager for the TDOC. In its memorandum of law, the TDOC claimed that Mr. McMahan's sentence calculation is in accordance with his felony convictions and the provisions of T.C.A. § 40-28-123(b)(1); that T.C.A. § 40-28-123 does not violate the due process, double jeopardy or ex post facto clauses of the Tennessee or United States Constitutions; that an inmate has no constitutional or inherent right to a conditional release prior to the expiration of a valid sentence; and that an inmate has no due process rights in a parole release hearing. Mr. McMahan responded in opposition to the motion.

On April 26, 2005, the trial court granted the TDOC's motion for summary judgment. The trial court stated

[T]he Court finds that the doctrine of separation of powers was not violated in this case; that Tenn. Code Ann. § 40-28-123 does not violate due process or double jeopardy; that Tenn. Code Ann. § 40-28-123 is constitutional as written; and that Tenn. Code Ann. § 40-28-123 is constitutional as applied to Mr. McMahan. Accordingly, summary judgment is GRANTED to the Respondent, and this case is hereby DISMISSED.

Mr. McMahan filed a Notice of Appeal on July 5, 2005. Mr. McMahan presents one issue for review:

1. Whether the appellant was denied due process and equal protection of the law by the procedure utilized by the Tennessee Department of Correction using an unconstitutional statute to deny any parole hearing and are the trial and appellate courts of Tennessee operate [sic] under a double standard in their interpretation of statutes that apply to convicts?

II. Analysis

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04. The moving party for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *See id.* In *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993), our Supreme Court stated:

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery material, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

Id. at 210-11 (citations omitted) (emphasis in original).

Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. *See Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). Because only questions of law are involved, there is no presumption of correctness regarding a trial court's grant or denial of summary judgment. *See Bain*, 926 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. *See Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997).

In his brief, Mr. McMahan argues that he was denied due process and equal protection by the TDOC when the department removed his release eligibility date (R.E.D.), pursuant to T.C.A. § 40-28-123, without notice or a hearing. T.C.A. § 40-28-123(b) states:

- (b) (1) Any prisoner who is convicted in this state of any felony except escape, and where the felony is committed while the prisoner is assigned to any work release, educational release, restitution release or other program whereby the prisoner enjoys the privilege of supervised release into the community, including, but not limited to, participation in any programs authorized by § 41-21-208 or § 41-21-227, the prisoner shall serve the remainder of the term without benefit of parole eligibility or further participation in any of these programs. The board shall have the authority to penalize or punish prisoners who escape from any of the above programs in accordance with board policy.
- (2) As a prerequisite to any inmate's placement in a program described in subdivision (b)(1), the board shall read and provide the inmate with a copy of subdivision (b)(1). The inmate shall then give written acknowledgment of receipt of the copy and shall signify comprehension of the provisions contained in it. A permanent file of these acknowledgments shall be maintained by the board.

T.C.A. § 40-28-123(b).

The Due Process Clause of the Fourteenth Amendment protects individuals in part by guaranteeing fair procedure. *Littles v. Campbell*, 97 S.W.3d 568, 572 (Tenn. Ct. App. 2002) (citing *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975 (1990)). “In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.” *Id.* Such a claim is not actionable until the State fails to provide due process. *Id.* The question, therefore, is what process is due, if any, and whether the process the State provides is constitutionally adequate. *Id.*

In order to determine what, if any, process is due Mr. McMahan, we must first determine whether the loss of his release eligibility date due is a constitutionally protected liberty interest. Under Tennessee law, a prisoner acquires no due process right to early parole or to a hearing on early parole. See, e.g., *Wright v. Trammel*, 810 F.2d 589, 591 (6th Cir. 1987); *Frazier v. Hesson*, 40 F. Supp.2d 957, 964 (W.D. Tenn. 1999); *Kaylor v. Bradley*, 912 S.W.2d 728, 735 (Tenn. Ct. App. 1995). In *Kaylor*, this Court held that “[t]he Due Process Clauses of the state and federal constitutions protect only genuine claims involving pre-existing entitlements. They do not protect unilateral expectations or abstract needs or desires.” *Kaylor*, 912 S.W.3d at 735. Unless a prisoner has a vested right in early release, he cannot state a due process claim. *Id.* Because Tennessee does not recognize a constitutional right to early release, Mr. McMahan cannot show that he has suffered a deprivation of a liberty interest or that he was entitled to any procedural due process in the TDOC’s revocation of his R.E.D.

Further, Mr. McMahan fails to establish that the TDOC’s policy in implementing T.C.A. § 40-28-123 denied him of his equal protection rights. In order to establish that his equal protection rights have been violated, Mr. McMahan must establish that he is a member of a protected class and that he has somehow been intentionally discriminated against because of his membership in that class. See *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990). Mr. McMahan has failed to provide any evidence or cite any authorities in support of his contention that his equal protection rights were violated in any way.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court. Costs of this appeal are assessed against the Appellant, Donald R. McMahan.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.